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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TRACY PETROCELLI,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:94-cv-0459-RCJ-VPC

ORDER

Introduction and Background

This action is a petition for writ of habeas corpus by Tracy Petrocelli, a Nevada prisoner under sentence of death. It is before the court on Petrocelli's Motion to Stay Proceedings and Hold Litigation in Abeyance (docket #203), filed April 21, 2010. In that motion, Petrocelli argues that this action should be stayed so that he may return once again to state court to exhaust his unexhausted claims. The court will deny the motion, will require Petrocelli to abandon his unexhausted claims or face dismissal of his entire petition, and will move this case toward resolution of Petrocelli's remaining claims, on their merits.

In its January 4, 1985 decision on Petrocelli's direct appeal, the Nevada Supreme Court described, as follows, the facts of the case as revealed by the evidence at trial:

Tracy Petrocelli's journey to Reno began in Washington where he killed his fiancée. He fled Washington and apparently drove to Colorado in a Corvette, to Oklahoma in a van and to Reno in a Datsun which he stole while "test driving" the

1 vehicle. Upon arriving in Reno, Petrocelli decided he needed a four-wheel drive truck
2 to get around in the snow. The next day, his search for a vehicle ultimately led to a
3 local used car dealer. The dealer, James Wilson, acceded to Petrocelli's request for a
4 test drive of a Volkswagen (VW) pickup, and the two drove off with the dealer at the
wheel. At about 1:30 p.m., a Dodge dealer saw them driving north on Kietzke Lane.
Approximately forty-five minutes later, a Reno patrolman saw one person driving a
truck matching the description of the VW speeding toward Pyramid Lake.

5 That evening, Petrocelli was picked up on the Pyramid Highway and given a
6 ride to Sutcliffe. He told the driver that his motorcycle had broken down. In Sutcliffe,
Petrocelli got a ride to Sparks with a local game warden. Petrocelli then took a cab to
7 Reno and apparently paid his fare from a two-inch roll of bills.

8 The next day, the game warden and his partner looked for Petrocelli's
9 motorcycle. Instead, they found the VW truck with bloodstains and bullet holes on
10 the passenger side. The car dealer's body was found later that day in a crevice,
11 covered with rocks, sagebrush and shrubbery. His back pockets were turned slightly
inside out and empty; his wallet was missing. The victim, who usually carried large
amounts of cash with him, had been shot three times with a .22 caliber weapon. One
shot was to the neck; another shot was to the heart. The third shot was to the back of
the head from a distance of two to three inches.

12 In the abandoned truck, .22 caliber bullet casings were found. When he was
13 arrested, Petrocelli was carrying a .22 caliber semi-automatic pistol which he testified
14 he always carried loaded and ready to fire. Ballistics tests on the casings found in the
abandoned VW revealed that they had been fired from Petrocelli's pistol. Tests on the
bullet found in Wilson's chest and a test bullet fired from Petrocelli's pistol also
revealed similar markings.

15 At trial, Petrocelli provided his own account of the killing. After driving off
16 the car lot, the car dealer stopped at a gas station and filled the truck. From the
station, Petrocelli drove the truck. He and Wilson proceeded to argue about the price
17 of the truck. Petrocelli laid \$3,500.00 on the dashboard and offered a total of
\$5,000.00 cash. The car dealer was insulted and called him a "punk." Later, on the
18 way back, Wilson twice grabbed for the steering wheel. Petrocelli then pulled out his
pistol and said: "Now who is the punk." The victim laughed and said he had a gun
19 also, although Petrocelli never saw one. The car dealer tried to take the pistol from
Petrocelli as he continued to drive. As they struggled, the gun went off two or three
20 times. Petrocelli testified, "I knew it was shooting, and I was just trying to pull it
away from him.... It was an accident. It was an accident. I didn't do anything. I just
21 tried to keep him from getting the gun." Petrocelli drove to a nearby doctor's office,
went up to the door, but did not go in because he "didn't know how to tell him
22 [doctor] there was someone hurt, shot in the car." Thereafter, Petrocelli went to a
bowling alley and called the hospital, but "didn't know what to say." He then returned
23 to the truck, drove to Pyramid Lake and hid the car dealer's body under some rocks.
Petrocelli began walking after his truck bogged down, but then returned to the vehicle
24 to retrieve his gloves and the gun. He also picked up the car dealer's wallet, took his
money, threw the business and credit cards into the wind, and discarded the wallet.
25 Petrocelli then walked to the highway where he obtained rides back to Reno.

1 Petrocelli was convicted by a jury of first degree murder and robbery with the
2 use of a deadly weapon. The sentence for the murder conviction was set at death.

3 *Petrocelli v. State*, 101 Nev. 46, 48-49, 692 P.2d 503, 505-06 (1985).

4 On September 8, 1982, the trial court imposed the sentence of death on the murder conviction,
5 and a sentence of imprisonment for 15 years on the robbery conviction, plus an additional 15 years in
6 prison for the use of a deadly weapon. Exhibit 5.¹

7 Petrocelli appealed. See Exhibit Z (opening brief); Exhibit AA (answering brief); Exhibit BB
8 (reply brief). The Nevada Supreme Court affirmed on January 4, 1985. *Petrocelli v. State*, 101 Nev.
9 46, 692 P.2d 503 (1985); see also Exhibit 9, Exhibit FF.

10 On August 12, 1985, Petrocelli filed a petition for post-conviction relief in the state district court.
11 Exhibit H. On March 20, 1985, the state district court held an evidentiary hearing. Exhibit Y
12 (transcript). On December 31, 1986, the state district court denied the petition. Exhibit I. Petrocelli
13 appealed. Exhibit JJ (opening brief); Exhibit KK (answering brief); Exhibit LL (reply brief). The
14 Nevada Supreme Court dismissed the appeal on June 23, 1988. Exhibit NN.²

15 On August 24, 1988, Petrocelli filed a petition for writ of habeas corpus in this court, initiating
16 the case of *Petrocelli v. Whitley*, CV-N-88-0446-HDM.³ Exhibit 16. Counsel was appointed to
17 represent Petrocelli. See Exhibits 2 and 5 to Respondents' February 7, 1997 Filing.⁴ On May 31, 1989,
18

19
20 ¹ Unless otherwise noted, the exhibits identified by numbers in this order were filed by
21 Petrocelli and are located in the record at docket #163 through #169. Unless otherwise noted, the
22 exhibits identified by letters in this order were filed by respondents and are located in the record at
23 docket #36, and docket #70 through #76.

24 ² The court refers to this state-court proceeding as Petrocelli's "first state habeas action."

25 ³ The court here uses its older system of file numbers to identify Petrocelli's first federal habeas
26 action. Using the court's current file number system, that case would be identified as *Petrocelli v.*
Whitley, 3:88-cv-0446-HDM.

⁴ In this action, on February 7, 1997, respondents filed a document entitled: "Response to
Petitioner's Explanation Why Grounds 26, 27, 28, 6 and 9 Should Not Be Barred As An Abuse of the
Writ" (docket #55) ("Respondents' February 7, 1997 Filing"). Attached to that document are 11
exhibits, which are copies of documents filed in *Petrocelli v. Whitley*, CV-N-88-0446-HDM.

1 upon a motion by Petrocelli, the court ordered his first federal habeas action, case number CV-N-88-
2 0446-HDM, dismissed without prejudice, to allow him to return to further exhaust his claims in state
3 court. See Exhibits 6, 7, 8, 9, 10, and 11 to Respondents' February 7, 1997 Filing.

4 On March 10, 1989, Petrocelli filed a petition for writ of habeas corpus in state district court.
5 Exhibit PP. The state district court dismissed that petition on January 22, 1992. Exhibit UU. Petrocelli
6 appealed. See Exhibit WW (opening brief); Exhibit XX (answering brief); Exhibit YY (reply brief).
7 The Nevada Supreme Court dismissed the appeal on December 22, 1993. Exhibit ZZ.⁵

8 Petrocelli then initiated this, his second, federal habeas corpus action, on July 13, 1994. He filed
9 the original habeas petition in the action on October 28, 1994 (docket #4). Counsel was appointed for
10 Petrocelli (docket #7, #8, #24). On February 9, 1996, Petrocelli filed a first amended habeas petition
11 (docket #28).

12 Respondents then filed a motion to dismiss, arguing that certain claims in the first amended
13 petition were unexhausted, procedurally barred, and constituted an abuse of the writ (docket #36). The
14 court granted that motion on abuse of the writ grounds, and dismissed five claims from the first amended
15 petition (docket #46, #56).

16 In an order entered September 30, 1997, this court denied the first amended habeas petition,
17 ruling that certain claims in it were an abuse of the writ and that certain claims were procedurally
18 defaulted, and denying the remainder of the claims on their merits (docket #78). Judgment was entered
19 (docket #79).

20 Petrocelli appealed (docket #80). In a published opinion filed on March 8, 2001, the court of
21 appeals affirmed in part, reversed in part, and remanded. *Petrocelli v. Angelone*, 248 F.3d 877 (9th
22 Cir.2001) (copy in record at docket #88). The court of appeals affirmed the district court's denial, on
23 the merits, of certain of Petrocelli's claims; the court reversed the district court's determinations that
24 certain claims were an abuse of the writ and that certain claims were procedurally defaulted. *Id.* The
25 court of appeals remanded for further proceedings. *Id.*

26

⁵ The court refers to this state-court proceeding as Petrocelli's "second state habeas action."

1 After receiving the remand, the district court heard from the parties regarding the status of the
2 remanded claims, with respect to the exhaustion of those claims in state court (*see* docket #92, #93, #94,
3 #97, #98, #99, #101). In an order entered February 7, 2003 (docket #100), the court ruled that the
4 remanded claims were "mixed," meaning that some of them had been exhausted in state court and some
5 had not. The court extended to Petrocelli the opportunity to amend his petition to remove the
6 unexhausted claims, and then, during a stay of this case, to return to state court to exhaust those claims.
7 Petrocelli then filed a second amended petition (docket #104), and then, to correct typographical errors,
8 a third amended petition (docket #108), purportedly including in it only claims exhausted in state court.
9 On May 28, 2003, the court ordered this action stayed pending Petrocelli's exhaustion of claims in state
10 court (docket #109).

11 On August 11, 2003, Petrocelli filed a petition for writ of habeas corpus in the state district court.
12 Exhibit 26. Petrocelli later filed a supplement to that petition. Exhibit 32. The state district court held
13 evidentiary hearings. Exhibits 29, 30, 31 (transcripts). The petition was dismissed by the state district
14 court on April 14, 2006. Exhibit 36. Petrocelli appealed. *See* Exhibit 38 (opening brief); Exhibit 39
15 (answering brief); Exhibit 40 (reply brief). The Nevada Supreme Court affirmed on July 26, 2007.
16 Exhibit 41.⁶

17 On November 16, 2007, upon a motion by Petrocelli, the stay of this action was lifted (docket
18 #147). On January 11, 2009, Petrocelli filed his fourth amended petition for writ of habeas corpus
19 (docket #162). The fourth amended petition includes 31 claims for habeas corpus relief, including
20 several with subparts.

21 On May 26, 2009, respondents filed a motion to dismiss, asserting that certain of Petrocelli's
22 claims have already been adjudicated; that certain of Petrocelli's claims are unexhausted in state court;
23 and that certain of Petrocelli's claims are procedurally barred. On March 23, 2010, the court granted
24 the motion to dismiss in part and denied it in part (docket #200). The court denied the motion to dismiss
25 with respect to Grounds 6(c), 6(d), 7(b), 7(f), 10, 12, and 13 of the fourth amended petition. The court
26

⁶ The court refers to this state-court proceeding as Petrocelli's "third state habeas action."

1 dismissed Grounds 1, 2, 3, 4, 5, 6(a), 6(b), 7(a), 7(c), 7(d), 8(a), and 8(c). The court ruled Grounds 7(e),
2 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h),
3 16(i), 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 to be unexhausted, and, with respect
4 to those unexhausted claims, the court granted Petrocelli time to file a notice of abandonment of
5 unexhausted claims, indicating his election to abandon the unexhausted claims and proceed with the
6 litigation of his remaining exhausted claims, or, in the alternative, to file a motion for stay, requesting
7 a stay of these proceedings to allow him to return to state court to exhaust the unexhausted claims. The
8 court ordered that, if Petrocelli did not, within the time allowed, file a notice of abandonment of
9 unexhausted claims, abandoning all of his unexhausted claims, or a motion for a stay to allow
10 exhaustion of his unexhausted claims in state court, his fourth amended petition would be dismissed,
11 in its entirety, pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

12 Petrocelli then filed his motion for stay (docket #203), respondents filed their opposition to the
13 motion (docket #212), and Petrocelli replied (docket #217).

14 *Rhines*

15 Under 28 U.S.C. § 2254(b)(1)(A), this federal court cannot grant a writ of habeas corpus unless
16 “the applicant has exhausted the remedies available in the courts of the State.” This exhaustion
17 requirement is “grounded in principles of comity” as it gives states “the first opportunity to address and
18 correct alleged violations of state prisoner’s federal rights.” *Coleman v. Thompson*, 501 U.S. 722, 731
19 (1991).

20 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court held that a district court may stay
21 a mixed petition – a petition containing both exhausted and unexhausted claims – in “limited
22 circumstances,” so that a petitioner may present his unexhausted claims to the state courts without losing
23 his right to federal habeas review to the one-year statute of limitations. *Rhines*, 544 U.S. at 273-75
24 (explaining how the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),
25 which imposed a one-year statute of limitations on the filing of federal petitions, affected the treatment
26 of mixed petitions). In *Rhines*, the Court ruled that a district court may stay a mixed petition only if:

1 (1) the petitioner has “good cause” for his failure to exhaust his claims in state court; (2) the
2 unexhausted claims are potentially meritorious; and (3) there is no indication that the petitioner
3 intentionally engaged in dilatory litigation tactics. *Id.* at 278. “[A] *Rhines* stay must be assessed “in
4 light of the Supreme Court’s instruction that the district court should only stay mixed petitions in
5 ‘limited circumstances.’” *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir.2008), citing *Rhines*, 544
6 U.S. at 273-75. Moreover, the court must keep in mind that AEDPA aims to encourage the finality of
7 sentences and to encourage petitioners to exhaust their claims in state court before seeking habeas relief
8 in federal court. *Rhines*, 544 U.S. at 276-77; *see also Wooten*, 540 F.3d at 1024.

9 For the reasons stated below with respect to each of Petrocelli’s unexhausted claims, the court
10 will deny Petrocelli’s request for a *Rhines* stay.

11 Ground 7(e)

12 In Ground 7(e), Petrocelli claims that his trial counsel was ineffective, at the penalty phase of
13 his trial, “for failing to object to instructions and final argument regarding the possibility of parole or
14 clemency.” Fourth Amended Petition, p. 185; *see also id.* at pp. 185-86.

15 Petrocelli argues that there is good cause for his failure to exhaust this claim, because of
16 “supervening authority” and “change in law.” Motion for Stay, pp. 4-7. Petrocelli argues that the court
17 should grant a stay to allow him to return to state court to present the claim in Ground 7(e), because the
18 Ninth Circuit, in 2008, decided *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir.2008), a case involving a
19 claim that a capital defendant’s constitutional rights were violated by the prosecutor’s argument that he
20 could receive clemency and parole if sentenced to death. Petrocelli appears to contend that he could not
21 have exhausted in state court the claim asserted in Ground 7(e) before *Sechrest* was decided. The court
22 finds this argument to be without merit.

23 The claim in Ground 7(e) is a claim of ineffective assistance of Petrocelli’s trial counsel. To
24 establish an ineffective assistance of counsel claim, the petitioner must show: (1) the representation was
25 deficient, falling “below an objective standard of reasonableness”; and (2) the deficient performance
26 prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong of

1 that analysis, the petitioner must show that "counsel made errors so serious that counsel was not
2 functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S.
3 at 687. "A convicted defendant making a claim of ineffective assistance must identify the acts or
4 omissions of counsel that are alleged not to have been the result of reasonable professional judgment."
5 *Id.* at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate
6 the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and
7 to evaluate the conduct of counsel's performance at the time." *Id.* at 689. Ineffective assistance of
8 counsel in violation of the Sixth Amendment is representation that falls "below an objective standard
9 of reasonableness" in light of "prevailing professional norms" at the time of the representation. *Id.* at
10 688-89; *see also Bobby v. Van Hook*, --- U.S. ---, 130 S.Ct. 13, 16-17, 175 L.Ed.2d 255 (2009).

11 Therefore, because the *Strickland* analysis looks to the professional norms prevailing at the time
12 of the representation, the decision in *Sechrest*, more than 25 years after Petrocelli's trial, has no impact
13 on the question whether Petrocelli received ineffective assistance of counsel as a result of his attorney's
14 failure to object to jury instructions and argument regarding the possibility of parole or clemency.

15 Furthermore, it is plain from the record that the claim in Ground 7(e) could have been
16 articulated, and exhausted in state court, before *Sechrest* was decided. In fact, Petrocelli made a closely
17 related argument – the substantive claim, that his constitutional rights were violated by the argument
18 regarding the availability of clemency and parole – in his first amended petition in this federal habeas
19 action, well before *Sechrest* was decided. There appears, therefore, to be no reason why Petrocelli could
20 not have exhausted in state court, in one of his three state-court habeas petitions, the claim that his
21 counsel was ineffective for failing to object to jury instructions and argument regarding the possibility
22 of parole or clemency. The 2008 *Sechrest* decision does not constitute good cause for Petrocelli's
23 failure to exhaust the claim in Ground 7(e).

24 Ground 8(b)

25 In Ground 8(b), Petrocelli claims that his appellate counsel was ineffective "for failure to argue
26 that there was insufficient evidence to support the robbery conviction and robbery as the underlying

1 felony for the felony-murder rule, and robbery as an aggravating circumstance.” Fourth Amended
 2 Petition, p. 188; *see also id.* at pp. 188-89.

3 Regarding his failure to exhaust this claim in state court, Petrocelli argues that there is good
 4 cause for his failure because the attorneys who litigated his three state-court habeas proceedings were
 5 ineffective for failing to raise it. *See* Reply in Support of Motion for Stay, p. 25.

6 *Rhines* does not go into detail as to what constitutes “good cause” for a failure to exhaust; and,
 7 the Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an
 8 “extraordinary circumstances” standard. *See Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir.2005)
 9 (citing *NLRB v. Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir.1979)).

10 Some district courts have concluded that the standard is more generous than the showing needed
 11 for “cause” to excuse a procedural default. *See, e.g., Rhines v. Weber*, 408 F.Supp.2d 844, 849
 12 (D.S.D.2005) (applying the Supreme Court’s mandate on remand). This view finds support in *Pace v.*
 13 *DiGuglielmo*, 544 U.S. 408 (2005), where the Supreme Court acknowledged that a petitioner’s
 14 “reasonable confusion” about the timeliness of his federal petition would generally constitute good
 15 cause for his failure to exhaust state remedies before filing his federal petition. *Pace*, 544 U.S. at 416-
 16 17.

17 On the other hand, a request for a *Rhines* stay must be assessed “in light of the Supreme Court’s
 18 instruction that the district court should only stay mixed petitions in ‘limited circumstances.’” *Wooten*
 19 *v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir.2008) (citing *Rhines*, 544 U.S. at 273-75). In *Wooten*, the
 20 petitioner attempted to show good cause under *Rhines* “by stating that he was ‘under the impression’ that
 21 his counsel included all of the issues raised before the California Court of Appeal in his petition before
 22 the California Supreme Court.” *Wooten*, 540 F.3d at 1024. Finding that justification inadequate, the
 23 Ninth Circuit explained as follows:

24 ... To accept that a petitioner’s “impression” that a claim had been included in
 25 an appellate brief constitutes “good cause” would render stay-and-obey orders routine.
 26 Indeed, if the court was willing to stay mixed petitions based on a petitioner’s lack of
 knowledge that a claim was not exhausted, virtually every habeas petitioner, at least
 those represented by counsel, could argue that he *thought* his counsel had raised an

1 unexhausted claim and secure a stay. Such a scheme would run afoul of *Rhines* and its
2 instruction that district courts should only stay mixed petitions in "limited
circumstances."

3 *Id.* (emphasis in original, citation omitted).

4 In *Riner v. Crawford*, 415 F.Supp.2d 1207 (D.Nev.2006), this court only required a petitioner
5 to show "that he was prevented from raising the claim, either by his own ignorance or confusion about
6 the law or the status of his case, or by circumstances over which he had little or no control, such as the
7 actions of counsel either in contravention of the petitioner's clearly expressed desire to raise the claim
8 or when petitioner had no knowledge of the claim's existence." *Riner*, 415 F.Supp. at 1211. The
9 decision in *Wooten*, however, undermines any reliance on *Riner*. Like the petitioner's claim in *Wooten*
10 that he was under the impression that counsel had raised unexhausted claims, Petrocelli's justification,
11 that his post-conviction counsel performed ineffectively in failing to raise the claim, is one that could
12 be raised in virtually every case. Acceptance of such a good-cause theory would conflict with the
13 Supreme Court's guidance, in *Rhines*, that mixed petitions should only be stayed in limited
14 circumstances, and it would run contrary to the goals of AEDPA.

15 The United States District Court for the Southern District of California, in a recent order,
16 rejected a claim of ineffective assistance of post-conviction counsel as good cause under *Rhines*, stating:

17 There appears to be a measure of agreement that some factor either external to
18 or outside the control of Petitioner may be sufficient to demonstrate good cause for
19 failure to exhaust claims in state court. As the Ninth Circuit has indicated that the
20 good cause standard does not require a showing as high as extraordinary
21 circumstances, and the Supreme Court has held that reasonable confusion over
22 timeliness may also provide a sufficient showing of good cause, this Court is
23 persuaded that a standard of "excusable neglect" is an appropriate and reasonable
24 standard to apply to an analysis of good cause under *Rhines*.

25 Here, Petitioner asserts that the failure to raise the unexhausted claims earlier
26 can be attributed to the fact that "state habeas counsel conducted a wide-ranging
investigation, raised an extensive array of claims, and may be faulted only in failing
to formulate and organize the claims in a manner that comports with the technical
requirements of section 2254 exhaustion." (Pet. Opp. and Mot. at 11.) Petitioner's
proffered reason does not constitute good cause for failing to exhaust Claim 14 in
state court. Under an application of the "excusable neglect" standard, "counsel's
oversight ... do[es] not constitute good cause" for failing to exhaust claims in state
court. [*Corjasso v. Ayers*, 2006 WL 618380 (E.D.Cal. March 9, 2006)] at *3.

1 The *Corjasso* court was careful to distinguish between “excusable neglect,”
 2 which could constitute good cause, and simple negligence, reasoning that “[t]he point
 3 is whether some outside, uncontrollable event precluded the bringing of the [] issue.”
 4 *Id.* at *2. In that case, the district court was not persuaded that counsel’s work load
 5 and oversight of the unexhausted claim failed to constitute good cause, reasoning that
 6 “[i]f the court found these circumstances to justify the delay, then good cause could
 7 be found in virtually every case, which the Supreme Court clearly did not intend in
 8 Rhines.” *Id.* at *3.

9 The situation presented here is analogous to that in *Corjasso*, as Petitioner’s
 10 failure to raise the claim in state court was not the result of any external event outside
 11 his control, but was due to deliberate decisions made by counsel in “formulating and
 12 organizing the claims” for presentation to the state supreme court. As such, “[s]imply
 13 saying that the issue was overlooked by counsel is not outside the control of
 14 petitioner since he is held bound by the acts of his counsel.” *Id.* at *2.

15 In sum, Petitioner is unable to demonstrate good cause for failing to exhaust
 16 Claim 14 in state court. Accordingly, the Court declines to stay the federal
 17 proceedings and hold the mixed federal petition in abeyance under *Rhines v. Weber*.

18 *Hoyos v. Cullen*, 2011 WL 11425 (S.D.Cal.2011) at *9-10.

19 While this court might hesitate to place an “excusable neglect” label on the *Rhines* good cause
 20 standard, this court agrees with the court in *Hoyos*, and the court in *Corjasso*, that a simple statement
 21 that state post-conviction counsel was ineffective for overlooking the issue is not enough to show good
 22 cause under *Rhines*, and that some factor either external to, or outside the control of, the petitioner and
 23 his counsel is required.

24 In this court’s view, under the circumstances in this case, to conclude that Petrocelli had good
 25 cause for his failure to exhaust, based simply upon his conclusory and unsupported assertion of
 26 ineffective assistance of counsel, without more, would conflict with the Supreme Court’s instruction in
 27 *Rhines* that mixed petitions should be stayed in only limited circumstances, and it would disregard and
 28 undermine the goals of the AEDPA, to encourage the finality of sentences, and to encourage petitioners
 29 to exhaust their claims in state court before filing in federal court. See *Rhines*, 544 U.S. at 273-77; see
 30 also *Wooten*, 540 F.3d at 1024. This court finds that Petrocelli has not shown good-cause, under *Rhines*,
 31 for his failure to previously exhaust, in state court, the claim in Ground 8(b).

1 Ground 9

2 In Ground 9, Petrocelli claims that he received ineffective assistance of counsel in his state post-
3 conviction proceedings. Fourth Amended Petition, pp. 195-96. Ground 9, for the most part, sets forth
4 only general and unspecified claims of attorney error. The only somewhat specific assertion of attorney
5 error in Ground 9 is the claim that counsel failed to investigate and discover available mitigating
6 evidence. *Id* at 195.

7 One of the showings that must be made, under *Rhines*, to establish that a stay is warranted, is
8 that the unexhausted claim is “potentially meritorious.” *Rhines*, 544 U.S. at 278. There is no federal
9 constitutional right to counsel in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S.
10 551 (1987); *Murray v. Giaratano*, 492 U.S. 1 (1989) (applying the rule to capital cases). Consequently,
11 there is no viable claim of constitutionally ineffective assistance of counsel in state post proceedings.
12 See *Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there
13 can be no deprivation of effective assistance). In veiw of these well-established principles, Petrocelli
14 has made no showing that the claim in Ground 9 has potential merit.

15 Ground 11

16 In Ground 11, Petrocelli claims that his constitutional rights were violated “because the
17 statutorily-mandated definition of ‘premeditation and deliberation’ given to his jury deprived him of due
18 process and equal protection.” Fourth Amended Petition, p. 200; *see also id.* at pp. 200-19. Petrocelli
19 argues that there is good cause for his failure to exhaust this claim, because of “intervening changes in
20 the law.” Motion for Stay, p. 10; *see also id.* at pp. 9-18. More specifically, Petrocelli argues that his
21 claim in Ground 11 is based upon the Ninth Circuit Court of Appeals’ decision in *Polk v. Sandoval*, 503
22 F.3d 903 (9th Cir.20007), and *Polk* was not decided until after his appeal in his third state habeas action.
23 Petrocelli’s argument is not compelling.

24 Petrocelli could have raised this claim in state court before *Polk* was decided. Petrocelli
25 demonstrated this himself. In the state district court, in his third petition for writ of habeas corpus, filed
26 August 11, 2003 – about four years before *Polk* was decided – Petrocelli made this claim. Exhibit 26,

1 pp. 21-25. Had Petrocelli asserted the claim on the appeal in that action, it would now be exhausted.
2 However, Petrocelli did not do that. The claim was abandoned and not asserted on appeal before the
3 Nevada Supreme Court. *See* Exhibit 38, pp. 18-20 (statement of issues presented on appeal in third state
4 habeas action). Petrocelli has provided no explanation – much less “good cause” – for his abandonment
5 of this claim on the appeal in his third state habeas action.

6 So, while the decision in *Polk* may have added some weight to Petrocelli’s claim, Petrocelli’s
7 ability to exhaust the claim was not dependent on the *Polk* decision, and Petrocelli has not shown good
8 cause for his failure to exhaust the claim.

9 Ground 14

10 In Ground 14, Petrocelli claims that his constitutional rights were violated “because the Nevada
11 capital punishment system operates in an arbitrary and capricious manner.” Fourth Amended Petition,
12 p. 252; *see also id.* at pp. 252-55.

13 With respect to this claim, Petrocelli appears to argue that a stay should be granted because “[t]o
14 Petitioner’s counsel’s knowledge, this issue has not been previously ruled on by the Nevada Supreme
15 Court, despite the obvious deficiencies of the state’s death penalty system.” Motion for Stay, p. 18.
16 This, however, is not a showing of good cause for Petrocelli’s failure to exhaust this claim. *See Rhines*,
17 544 U.S. at 278. In fact, if Petrocelli had not abandoned this claim on the appeal in his third state habeas
18 action, it is possible that the Nevada Supreme Court might have ruled on this claim. Petrocelli raised
19 this claim in his state habeas petition, in the state district court, in his third state habeas action, but he
20 did not assert the claim in his appeal. *See* Exhibit 26, pp. 30-33; Exhibit 38, pp. 18-20. Petrocelli offers
21 no explanation for the abandonment of the claim on the appeal in his third state habeas action, and he
22 has, therefore, failed to show good cause for his failure to exhaust the claim.

23 Grounds 15(a), 15(b), 15(c), 15(d), 15(e)

24 In Ground 15, Petrocelli claims that his constitutional rights were violated “due to the substantial
25 and injurious effect of a consistent pattern of prosecutorial misconduct and overreaching which distorted
26 the fact finding process and rendered both the trial and sentencing hearing fundamentally unfair.”

1 Fourth Amended Petition, p. 256; *see also id.* at pp. 256-62. Ground 15 includes five subparts,
 2 designated Grounds 15(a), 15(b), 15(c), 15(d), and 15(e). *See id.* at 256-62. In Ground 15(a), Petrocelli
 3 claims that the prosecution committed misconduct “by giving inadequate notice of intent to seek the
 4 death penalty.” *Id.* at 258; *see also id.* at pp. 258-60. In Ground 15(b), Petrocelli claims that the
 5 prosecution “improperly disparaged Mr. Petrocelli by using pejorative terminology.” *Id.* at p. 260; *see*
 6 *also id.* at pp. 260-61. In Ground 15(c), Petrocelli claims that the prosecution “improperly instructed
 7 the jurors to send a message to the community.” *Id.* at p. 261; *see also id.* at pp. 261-62. In Ground
 8 15(d), Petrocelli claims that the prosecution committed misconduct “in failing to turn over the letter
 9 from Dr. Gerow to the prosecutor.” *Id.* at p. 262. In Ground 15(e), Petrocelli claims that “[t]rial,
 10 appellate and post-conviction counsel were ineffective for failing to challenge the extensive
 11 prosecutorial misconduct which occurred in Mr. Petrocelli’s trial.” *Id.* at p. 262.

12 With respect to all of his Ground 15 claims, Petrocelli argues that there is good cause for his
 13 failure to exhaust because of ineffective assistance of his counsel, in failing to assert these claims on his
 14 direct appeal and in his three state habeas actions. *See Motion for Stay*, p. 19.

15 This court finds that Petrocelli has not made a showing of good cause for his failure to exhaust
 16 the claims asserted in Grounds 15(a), 15(b), 15(c), 15(d), and 15(e). *See discussion of Ground 8(b)*,
 17 *supra*.

18 Grounds 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i)

19 In Ground 16, Petrocelli claims that his constitutional rights were violated “due to trial court
 20 errors at voir dire and the failure of counsel to object to the jury selection process.” Fourth Amended
 21 Petition, p. 263; *see also id.* at pp. 263-83. Ground 16 includes nine somewhat overlapping subparts,
 22 which are designated Grounds 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), and 16(i). *See id.*
 23 at 256-62. In Ground 16(a), Petrocelli claims that “[t]he trial court improperly death-qualified the jury,
 24 failed to life-qualify the jury, and prevented the defense from individually questioning potential jurors
 25 concerning their views on the death penalty.” *Id.* at 266; *see also id.* at 266-68. In Ground 16(b),
 26 Petrocelli claims that “[t]he trial court failed to adequately inquire as to bias.” *Id.* at 268; *see also id.*

1 at 268-70. In Ground 16(c), Petrocelli claims that “[t]he trial court failed to life-qualify prospective
2 jurors.” *Id.* at 270; *see also id.* at 270-73. In Ground 16(d), Petrocelli claims that “[t]he trial court
3 improperly imposed overly-restrictive voir dire standards.” *Id.* at 273; *see also id.* at 273-77. In Ground
4 16(e), Petrocelli claims that “[d]efense counsel were ineffective for failing to rehabilitate death reticent
5 jurors.” *Id.* at 277; *see also id.* at 277-78. In Ground 16(f), Petrocelli claims that “[t]he trial court erred
6 by failing to provide individual sequestered voir dire.” *Id.* at 278; *see also id.* at 278-79. In Ground
7 16(g), Petrocelli claims that “[t]he trial court ... erroneously failed to closely examine the beliefs of the
8 prospective jurors and examined them in a hurried, incomplete and inconsistent manner.” *Id.* at 279-80.
9 In Ground 16(h), Petrocelli claims that “[t]rial counsel failed to provide constitutionally effective
10 representation during the entire jury selection process.” *Id.* at 281; *see also id.* at 281-82. In Ground
11 16(i), Petrocelli claims that “[a]ppellate and post-conviction counsel were ineffective in failing to raise
12 this claim.” *Id.* at 282; *see also id.* at 282-83.

13 Petrocelli argues that there is good cause for his failure to exhaust all of these claims because
14 of “subsequent legal developments that were not in existence at the time of Mr. Petrocelli’s appeal.”
15 Motion for Stay, p. 19. The only “subsequent legal development” cited by Petrocelli, however, is the
16 United States Supreme Court’s decision in *Morgan v. Illinois*, 504 U.S. 719 (1992), issued June 15,
17 1992. *See id.* The *Morgan* decision predated by more than a decade Petrocelli’s third state-court
18 petition for writ of habeas corpus. The timing of the decision in *Morgan* does not explain why the
19 claims in Ground 16 were not raised in Petrocelli’s third state habeas action.

20 Petrocelli also argues that his appellate counsel was ineffective for failing to raise this issue on
21 his appeal, apparently referring to his direct appeal to the Nevada Supreme Court. *See* Motion for Stay,
22 pp. 19-20. Here again, however, the court does not accept such a claim of ineffective assistance of
23 counsel, without more, as satisfaction of the good-cause requirement imposed by *Rhines*. *See* discussion
24 of Ground 8(b), *supra*. And, moreover, this ineffective assistance of appellate counsel does not appear
25 to speak to Petrocelli’s failure to raise these claims in his third state habeas action.

26 Petrocelli has not shown good cause for his failure to exhaust the claims set forth in Ground 16.

1 Ground 17

2 In Ground 17, Petrocelli claims that his constitutional rights were violated “by the introduction
3 of inaccurate, prejudicial and fundamentally flawed evidence of ‘future dangerousness’ at the penalty
4 phase.” Fourth Amended Petition, p. 284; *see also id.* at pp. 284-302.

5 Petrocelli argues that, in view of developments in the law “since the time of Mr. Petrocelli’s
6 appeal and initial habeas applications,” there is good cause for his failure to exhaust this claim. Motion
7 for Stay, p. 20; *see also* Reply in Support of Motion for Stay (docket #217), p. 30. Petrocelli cites the
8 Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as
9 the critical subsequent legal development. *See* Motion for Stay, p. 20.

10 However, the *Daubert* case was decided in 1993, more than ten years before Petrocelli filed his
11 third state-court petition for writ of habeas corpus. *See* Exhibit 26. *Daubert* was on the books when
12 that third round of state post-conviction litigation was conducted, and there is no reason presented by
13 Petrocelli to explain why the claim in Ground 17 were not raised in that petition. Petrocelli has not
14 shown good cause for his failure to exhaust the claim in Ground 17.

15 Ground 18

16 In Ground 18, Petrocelli claims that his constitutional rights were violated “due to the failure of
17 the trial court to provide his jury with a Unanimity Instruction.” Fourth Amended Petition, p. 303; *see*
18 *also id.* at pp. 303-06.

19 As the court understands Petrocelli’s argument, his only theory that there was good cause for
20 his failure to exhaust this claim in state court is that the claim “is based on fundamental due process
21 concerns that should have been raised by trial and appellate counsel but, through no fault of Petitioner,
22 were not.” Motion for Stay, p. 21; *see also* Reply in Support of Motion for Stay, pp. 30-31. This is not
23 a showing of good cause. *See* discussion of Ground 8(b), *supra*.

24 Ground 19

25 In Ground 19, Petrocelli claims that his constitutional rights were violated “because the jury
26 instructions did not properly instruct the jury on the limited use of prior bad act evidence in the penalty

1 phase and did not protect against the arbitrary and capricious infliction of the death penalty.” Fourth
2 Amended Petition, p. 307; *see also id.* at pp. 307-11.

3 Pointing to *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998), *Hollaway v. State*, 116 Nev.
4 732, 6 P.3d 987 (2000), and *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), Petrocelli argues that this
5 claim is “largely based on law that has changed since the direct appeal and may well apply retroactively
6 to Mr. Petrocelli’s case.” Motion for Stay, p. 22. *Middleton*, *Hollaway*, and *Evans*, however, were all
7 decided well before Petrocelli litigated his third state habeas action. The petition in Petrocelli’s third
8 state habeas action was filed August 11, 2003. *See* Exhibit 26. Petrocelli makes no showing of good
9 cause for his failure to raise this claim in that proceeding.

10 Ground 20

11 In Ground 20, Petrocelli claims that his constitutional rights were violated “due to the admission
12 of cumulative and prejudicial victim impact testimony at the guilt and penalty phases of his trial.”
13 Fourth Amended Petition, p. 312; *see also id.* at pp. 312-14.

14 Petrocelli argues that “[t]here is good cause to allow this claim to be exhausted as it is largely
15 based on *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991), which the state courts did not have
16 an opportunity to rule on at the time of Petitioner’s appeal.” Motion for Stay, p. 23; *see also* Reply in
17 Support of Motion for Stay, p. 32. *Payne*, though, was decided some 12 years before Petrocelli initiated
18 his third state habeas action. *See* Exhibit 26. In addition, *Payne* was decided while Petrocelli’s second
19 state habeas action was still pending in the state district court. *See* Exhibits PP and UU. The timing
20 of the *Payne* decision does not establish good cause for Petrocelli’s failure to exhaust the claim in
21 Ground 20. Petrocelli also argues that his counsel were ineffective for failing to raise this claim on
22 appeal or in his state habeas actions. However, as is discussed above, in this court’s view, such an
23 assertion of attorney incompetence in failing to raise the claim in state court, without more, does not
24 show good cause under *Rhines*. *See* discussion of Ground 8(b), *supra*.

1 Ground 21

2 In Ground 21, Petrocelli claims that his constitutional rights were violated “because he was
3 deprived of the adequate assistance of an institutionalization expert.” Fourth Amended Petition, p. 315;
4 *see also id.* at pp. 315-18. Petrocelli claims that his trial counsel were ineffective, in violation of his
5 constitutional rights, for failing to obtain the services of, and present the testimony of, such an expert.
6 *See id.* at 315-18.

7 Petrocelli argues, in his Motion for Stay, that there is good cause for his failure to exhaust this
8 claim in state court, because “[t]he main body of research upon which it is based is of relatively recent
9 origin.” Motion for Stay, p. 24. Petrocelli lists the following literature as representing that “body of
10 research” upon which the claim in Ground 21 is based: DeLisi and Conis (eds.), *Violent Offenders:*
11 *Theory, Research, Public Policy, and Practice* (Boston, 2008) at 237-53; Goldstein, (ed.), *Forensic*
12 *Psychology* (vol. 11 of 12); Weiner (ed.), *Handbook of Psychology* (New York, 2003); Cunningham,
13 Reidy and Sorensen, “Assertions of ‘Future Dangerousness’ at Federal Capital Sentencing: Rates and
14 Correlates of Subsequent Prison Misconduct and Violence, *Law and Human Behavior* (Sept. 2007); and
15 Cunningham and Sorensen, Predictive Factors for Violent Misconduct in Close Custody, *Prison Journal*
16 87, 241-53 (2007). *Id.* at 24. Petrocelli states: “While effective counsel would have presented expert
17 testimony from an institutionalization expert to rebut the State’s evidentiary presentation of future
18 dangerousness in the penalty phase, there have been many advances in the literature since then.” *Id.* at
19 24-25.

20 The claim in Ground 21 is a claim of ineffective assistance of trial counsel. As is discussed,
21 above, with regard to Ground 7(e), the analysis of a claim of ineffective assistance of counsel looks at
22 whether counsel’s performance was reasonably competent in light of prevailing professional norms *at*
23 *the time.* *See Strickland*, 466 U.S. at 688-89; *see also Bobby v. Van Hook*, --- U.S. ---, 130 S.Ct. 13,
24 16-17, 175 L.Ed.2d 255 (2009). Because, under *Strickland*, the analysis of counsel’s performance is
25 conducted from the perspective of the time of the trial, subsequent advances in the literature have no
26

1 bearing on the issue of ineffective assistance of counsel, and certainly do not show good cause for
 2 Petrocelli's failure to exhaust this claim.

3 Petrocelli also argues, in the same generic manner found throughout his motion for stay, that his
 4 counsel were ineffective for failing to exhaust this claim. This bald assertion, however, does not
 5 establish good cause, within the meaning of the *Rhines* decision. See discussion of Ground 8(b), *supra*.

6 Ground 22

7 In Ground 22, Petrocelli claims that his constitutional rights were violated "because Mr.
 8 Petrocelli's capital trial, sentencing, and review on direct appeal were conducted before state judicial
 9 officers whose tenure in office was not during good behavior but whose tenure was dependent on
 10 popular election." Fourth Amended Petition, p. 319; see also *id.* at pp. 319-21.

11 Petrocelli argues that his appellate and state post-conviction counsel were ineffective for failing
 12 to exhaust this issue in the state courts. See Motion for Stay, p. 25. The court does not accept such a
 13 bald claim of ineffective assistance of counsel, without more, as satisfaction of the good-cause
 14 requirement imposed by *Rhines*. See discussion of Ground 8(b), *supra*.

15 Ground 23

16 In Ground 23, Petrocelli claims that his constitutional rights were violated "because execution
 17 by lethal injection violates the constitutional prohibition against cruel and unusual punishments."
 18 Fourth Amended Petition, p. 322; see also *id.* at pp. 322-30.

19 With respect to this claim, Petrocelli's entire argument, in his motion for stay, is as follows:

20 The court has ruled that this claim is unexhausted. However, good cause
 21 exists to allow Petitioner to return to state courts to exhaust this claim. Much of the
 22 information upon which this claim is based is quite new. See Exhibits 142-146. At
 23 the time of Petitioner's appeal or state habeas actions, much of the background on the
 24 Nevada lethal injection protocol was still not public knowledge, so there would have
 been no feasible way for it to have been successfully raised previously. This
 probably accounts for the fact that the claim was not presented to the Nevada
 Supreme Court in the last round of state habeas proceedings. Petitioner should be
 allowed to exhaust this claim in the state courts.

25 Motion for Stay, pp. 25-26 (citation to order entered March 23, 2010 (docket #200) omitted).

1 Exhibit 142 is a copy of the Nevada Department of Corrections' "Confidential Execution
2 Manual," as revised in February 2004. Exhibit 143 is a copy of an amicus brief filed in the United
3 States Supreme Court in a case out of the Eleventh Circuit Court of Appeals entitled *Nelson v.*
4 *Campbell*. Exhibit 144 is a copy of a Las Vegas Sun article, from March 18, 2004, entitled "Killer
5 Makes Final Requests," regarding the then-imminent execution of Lawrence Colwell. Exhibit 145 is
6 a copy of an article from a medical journal, The Lancet, entitled "Inadequate Anaesthesia in Lethal
7 Injection for Execution," dated April 16, 2005. And, Exhibit 146 is a declaration of Mark J. S. Heath,
8 M.D., apparently produced for use in the case of *Beets v. McDaniel*, 2:04-cv-0085-KJD-GWF, and
9 signed by Dr. Heath on May 16, 2006.

10 Petrocelli does not describe what efforts he made, while in state court, to obtain the Nevada
11 Department of Corrections' execution manual, in order to support his state court litigation of the claim
12 in Ground 23; nor does Petrocelli explain why that document could not have been obtained by means
13 of a subpoena or other legal process in state court. Petrocelli does not explain the significance of the
14 amicus brief from the *Nelson* case, with respect to his claimed ability to exhaust the claim he sets forth
15 in Ground 23. Similarly, with respect to the March 18, 2004, Las Vegas Sun article and the April 16,
16 2005, Lancet article, Petrocelli does not identify what information in those articles he claims was
17 necessary to his ability to exhaust his claim. Finally, Petrocelli does not describe the circumstances of
18 the production of the Heath declaration, he does not explain why that declaration, or one similar to it,
19 could not have been obtained earlier, and he does not provide any explanation why the information in
20 that declaration was necessary to his exhaustion of his claim.

21 The record shows that Petrocelli was able to, and in fact did, articulate his Ground 23 claim in
22 state court in 2003 when he initiated his third state habeas action. See Exhibit 26, pp. 34-38. However,
23 Petrocelli abandoned that claim on appeal, and, therefore, did not exhaust it. See Exhibits 38 and 40.
24 Petrocelli has made no showing of good cause for his abandonment of the claim on the appeal in his
25 third state habeas action, or for his failure to exhaust the claim in general.

26

1 Ground 24

2 In Ground 24, Petrocelli claims that his constitutional rights were violated “due to the failure of
3 the Nevada Supreme Court to conduct fair and adequate appellate review.” Fourth Amended Petition,
4 p. 331; *see also id.* at pp. 331-33.

5 In his motion for stay, Petrocelli argues that there is good cause for his failure to exhaust this
6 claim in state court, on his direct appeal, “as it could not have been brought earlier on appeal, as it is
7 based on the deficiencies of the direct appeal opinion.” Motion for Stay, p. 26. This argument, of
8 course, does not address the real question, which is: why was this claim not raised in any of Petrocelli’s
9 three state habeas actions? After respondents posed that question in their response to the motion for stay
10 (*see* Opposition to Motion for Stay, p. 60), Petrocelli argued, in his reply: “As to why it was not
11 presented in state post-conviction proceedings, Petitioner has claimed that it is due to ineffective post-
12 conviction counsel.” Reply in Support of Motion for Stay, p. 35. Petrocelli provides no further
13 argument about, or any substantiation of, such a claim of ineffective assistance of post-conviction
14 counsel. Such a bald claim of ineffective assistance of counsel, without more, does not satisfy the good-
15 cause prong of the *Rhines* standards. *See* discussion of Ground 8(b), *supra*.

16 Ground 25

17 In Ground 25, Petrocelli claims that his constitutional rights were violated “by the failure to
18 submit all of the elements of capital eligibility to the grand jury or to the court for a probable cause
19 determination.” Fourth Amended Petition, p. 334; *see also id.* at pp. 334-35.

20 In his motion for stay, Petrocelli asserts that this claim has merit (albeit without any citation to
21 any controlling legal authority), and then Petrocelli goes to state, without explanation: “The failure to
22 raise this claim earlier was not Petitioner’s fault.” Motion for Stay, p. 27. In his reply, Petrocelli asserts
23 that ineffective assistance of his post-conviction counsel is good cause for his failure to exhaust the
24 claim. *See* Reply in Support of Motion for Stay, pp. 35-36.

1 As is discussed above, the court does not accept such a claim of ineffective assistance of counsel,
 2 without more, as satisfaction of the good-cause requirement imposed by *Rhines*. See discussion of
 3 Ground 8(b), *supra*.

4 Ground 26

5 In Ground 26, Petrocelli claims that his constitutional rights were violated "because the death
 6 penalty is cruel and unusual punishment in all circumstances." Fourth Amended Petition, p. 336; see
 7 *also id.* at pp. 336-37.

8 This general challenge to the death penalty conflicts with the holding of the United States
 9 Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). In that case, the Court ruled that execution by
 10 lethal injection, as carried out in Kentucky, was constitutional. It appears the *Baze* holding forecloses
 11 Petrocelli's argument that the death penalty, no matter how administered, is necessarily unconstitutional.
 12 Petrocelli does not explain how his claim in Ground 26 could have any possible merit in light of *Baze*.

13 Furthermore, Petrocelli does not show good cause for his failure to exhaust this claim in state
 14 court. Petrocelli actually asserted this claim in the state district court in his third state habeas action (see
 15 Exhibit 26, pp. 28-29), but he did not raise the issue before the Nevada Supreme Court on the appeal
 16 in that action. See Exhibits 38 and 40.

17 Petrocelli argues:

18 Petitioner requests that he be allowed to exhaust this claim in the state courts. There
 19 is "good cause" for this request because Mr. Petrocelli asserts that under modern,
 20 evolving standards of decency, it is cruel and unusual punishment for the government
 to kill its own citizens. As these standards have evolved since Petitioner was last in
 state court, those courts should be afforded an opportunity to rule on this claim.

21 Motion for Stay, p. 27. Petrocelli offers no explanation how "standards of decency" have evolved since
 22 he litigated his third state habeas action.

23 Petrocelli also asserts, with respect to this claim, his generic argument that there is good cause
 24 for his failure to exhaust this claim because of ineffectiveness of his counsel in failing to raise it on
 25 direct appeal or on the appeal in any of his three state habeas actions. See Motion for Stay, pp. 27-28.

1 Petrocelli's bald claim of ineffective assistance of counsel, without more, does not establish good cause
2 for his failure to exhaust this claim. *See* discussion of Ground 8(b), *supra*.

3 Ground 27

4 In Ground 27, Petrocelli claims that his "conviction and sentence are invalid pursuant to the
5 rights and protections afforded him under the International Covenant on Civil and Political Rights."
6 Fourth Amended Petition, p. 338; *see also id.* at pp. 338-39.

7 Here again, Petrocelli made the claim in Ground 27 before the state district court in his third
8 state habeas action (*see* Exhibit 26, pp. 40-41), but he did not raise the issue before the Nevada Supreme
9 Court on the appeal in that action. *See* Exhibits 38 and 40.

10 Petrocelli argues that there is good cause for his failure to exhaust this claim "because
11 international law is increasingly being considered by various courts in their rulings." Motion for Stay,
12 p. 28. Petrocelli offers no further explanation or support for that argument. It is not a showing of good
13 cause for his failure to exhaust the claim.

14 Furthermore, Petrocelli's claim of ineffective assistance of counsel, for not raising this claim on
15 direct appeal or on the appeal in any of his state habeas actions, without more, does not establish good
16 cause for his failure to exhaust this claim. *See* discussion of Ground 8(b), *supra*.

17 Ground 28

18 In Ground 28, Petrocelli claims that his death sentence is unconstitutional "because of the risk
19 that the irreparable punishment of execution will be applied to innocent persons." Fourth Amended
20 Petition, p. 340; *see also id.* at pp. 340-42.

21 Petrocelli argues that there is good cause for his failure to exhaust this claim, as follows:

22 There is "good cause" for this request [to be allowed to exhaust this claim in the state
23 courts] as through no fault of Petitioner this claim was never previously presented in
24 state court. Additionally, since his last round of state habeas proceedings, the factual
25 basis of the claim has shifted in Petitioner's favor due to widespread publicity
26 regarding the possible execution of innocent persons. An example would be the
widespread controversy regarding the Todd Willingham case in Texas.

1 Motion for Stay, pp. 28-29. There is no further explanation or support for this argument. The allegation
 2 that there was not as much “publicity regarding the possible execution of innocent persons” when
 3 Petrocelli litigated his direct appeal and his three state habeas actions, as there is now, does not amount
 4 to a showing of good cause for Petrocelli’s failure to exhaust.

5 Furthermore, Petrocelli’s claim of ineffective assistance of counsel, for not raising this claim on
 6 direct appeal or on the appeal in any of his state habeas actions, without more, does not establish good
 7 cause for his failure to exhaust this claim. *See* discussion of Ground 8(b), *supra*.

8 Ground 29

9 In Ground 29, Petrocelli claims that his constitutional rights have been violated because “[t]he
 10 execution of a death sentence after keeping the condemned on death row for an inordinate amount of
 11 time constitutes cruel and unusual punishment.” Fourth Amended Petition, p. 343; *see also id.* at pp.
 12 343-53.

13 With respect to the question of good cause for his failure to exhaust this claim, Petrocelli argues:

14 There is “good cause” for this request [to be allowed to exhaust this claim in the state
 15 courts] as through no fault of Petitioner, the state courts have never had the
 16 opportunity to rule on it. The circumstances of the claim have changed since Mr.
 17 Petrocelli was last in state court, as several additional years have been added to his
 18 confinement, through no choice of his own. Additionally, to the extent that appellate
 19 counsel and state post-conviction counsel failed to raise this issue on direct appeal,
 20 their defective assistance deprived Mr. Petrocelli of his state and federal due process
 21 and equal protection right to effective assistance of counsel on appeal and in post-
 22 conviction, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to
 23 the Constitution.

24 Motion for Stay, p. 29.

25 The fact that Petrocelli has been confined for “several additional years” – about four years,
 26 actually – since he litigated his last state habeas action, does not establish good cause for his failure to
 exhaust this claim in that state habeas action.

Moreover, Petrocelli’s claim of ineffective assistance of counsel, for not raising this claim in any
 of his state habeas actions, without more, does not establish good cause for his failure to exhaust this
 claim. *See* discussion of Ground 8(b), *supra*.

1 Ground 30

2 In Ground 30, Petrocelli claims that his constitutional rights have been violated “due to the
3 cumulative errors in the admission of evidence and instructions, gross misconduct by State officials and
4 witnesses, and the systematic deprivation of Mr. Petrocelli’s right to the effective assistance of counsel.”
5 Fourth Amended Petition, p. 354; *see also id.* at pp. 354-56.

6 Petrocelli’s only argument that there is good cause for his failure to exhaust this claim is his
7 blanket ineffective assistance of counsel argument. As is discussed above, the court does not accept as
8 good cause, under *Rhines*, Petrocelli’s bald statement that his counsel were ineffective for not
9 exhausting the claim. *See* discussion of Ground 8(b), *supra*.

10 Ground 31

11 Finally, in Ground 31 Petrocelli claims that his conviction and sentence are unconstitutional
12 “because he may become incompetent to be executed.” Fourth Amended Petition, p. 357.

13 It appears that Ground 31 does not, at least at this time, state a potentially meritorious claim.
14 *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 632-35 (9th Cir.1997), *affirmed sub nom. Stewart v.*
15 *Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). Moreover, in *Panetti v. Quarterman*, 551
16 U.S. 930 (2007), the Supreme Court held that it is unnecessary to raise an unripe claim of incompetency
17 in an initial habeas petition in order to preserve the claim.

18 Regarding the question of good cause for his failure to exhaust this claim in state court,
19 Petrocelli argues:

20 There is “good cause” for this request [to be allowed to exhaust this claim in the state
21 courts] as it appears that a claim anticipating incompetence to be executed should be
22 raised in an initial petition for writ of habeas corpus. *Martinez-Villareal v. Stewart*,
23 118 F.3d 628 (9th Cir.1997), *affirmed sub nom. Stewart v. Martinez-Villareal*, 523
U.S. 637, 118 S.Ct. 1618 (1998). Mr. Petrocelli therefore requests that the state
courts have an opportunity to first rule on this claim so that it may be preserved for
federal habeas review.

24 Motion for Stay, pp. 30-31. But the *Martinez-Villareal* argument does not establish good cause for
25 Petrocelli’s failure to exhaust this claim in state court. Petrocelli could have exhausted this claim just
26

1 as well in his third state habeas action as he could now. To the extent such a claim would have been
 2 held to be premature in Petrocelli's third state habeas action, it would be now as well.

3 Kelly

4 Petrocelli requests a *Kelly* stay, in the alternative, in case a *Rhines* stay is not granted. See
 5 Motion for Stay, pp. 33-47. The court will deny that request.

6 In *King v. Ryan*, 564 F.3d 1133 (9th Cir.2009), the court of appeals held that, in addition to the
 7 stay procedure authorized in *Rhines*, district courts retain discretion to permit petitioners to follow the
 8 three-step stay-and-abeyance procedure approved in *Calderon v. U.S. Dist. Ct. (Taylor)*, 134 F.3d 981,
 9 986 (9th Cir.1998), and *Kelly v. Small*, 315 F.3d 1063 (9th Cir.2003). Following that procedure
 10 (sometimes referred to as the "*Kelly* procedure" or a "*Kelly* stay"): (1) a petitioner amends his petition
 11 to delete any unexhausted claims; (2) the district court stays and holds in abeyance the amended, fully
 12 exhausted petition, allowing the petitioner the opportunity to proceed to state court to exhaust the
 13 deleted claims; and (3) the petitioner later amends his petition again incorporating the newly-exhausted
 14 claims. *Kelly*, 315 F.3d at 1070-71. The *Kelly* procedure has no requirement of a showing of good
 15 cause for the petitioner's failure to exhaust.

16 However, compared to the *Rhines* procedure, the *Kelly* procedure has a significant drawback for
 17 petitioners. "Unlike the *Rhines* procedure, the *Kelly* procedure does nothing to protect a petitioner's
 18 unexhausted claims from untimeliness in the interim." *King*, 564 F.3d at 1141.

19 On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect.
 20 Pub.L. No. 104-132, 110 Stat. 1214-1226 (1996). The AEDPA made various amendments to the
 21 statutes controlling federal habeas corpus practice. One of the amendments imposed a one-year statute
 22 of limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations,
 23 the habeas corpus statute provides:

24 (d)(1) A 1-year period of limitation shall apply to an application for a
 25 writ of habeas corpus by a person in custody pursuant to the judgment
 26 of a State court. The limitation period shall run from the latest of –

1 (A) the date on which the judgment became final by the
2 conclusion of direct review or the expiration of the time for
seeking such review;

3 (B) the date on which the impediment to filing an application
4 created by State action in violation of the Constitution or laws
of the United States is removed, if the applicant was prevented
5 from filing by such State action;

6 (C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has
7 been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

8 (D) the date on which the factual predicate of the claim or
9 claims presented could have been discovered through the
exercise of due diligence.

10 28 U.S.C. § 2244(d)(1). The AEDPA limitations period is tolled while a “properly filed application”
11 for post conviction or other collateral relief is pending before a state court. 28 U.S.C. § 2244(d)(2). The
12 limitations period is not tolled, however, during the pendency of a federal habeas petition. *See Duncan*
13 *v. Walker*, 533 U.S. 167 (2001).

14 Therefore, if the *Kelly* procedure is followed, in order to avoid a statute of limitations bar, the
15 newly-exhausted claims, which are to be set forth in an amended petition after the stay is lifted, must
16 relate back to claims in the fully-exhausted stayed petition. *See King*, 564 F.3d at 1142.

17 “An amendment of a pleading relates back to the date of the original pleading when ... the claim
18 ... asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or
19 attempted to be set forth in the original pleading.” Fed.R.Civ.Pro. 15(c)(2). In *Mayle v. Felix*, 545 U.S.
20 644 (2005), the Supreme Court held that a petitioner may amend to add a new claim into a pending
21 federal habeas petition after the expiration of the limitations period only if the new claim shares a
22 “common core of operative facts” with the claims in the pending petition. *Mayle*, 545 U.S. at 659. An
23 amended habeas petition, “does not relate back when it asserts a new ground for relief supported by facts
24 that differ in both time and type from those the original pleading set forth.” *Id.* at 649.

25 A district court exercises discretion in determining whether or not to grant a *Kelly* stay. *Kelly*,
26 315 F.3d at 1070. The court may properly refuse to stay an exhausted habeas petition when the statute

1 of limitations would prevent the petitioner from ever successfully amending to re-assert his claim. *See*
2 *King*, 564 F.3d. at 1141-42.

3 In this case, the one-year AEDPA limitations period ran out long ago. The record indicates that
4 there has been no post-conviction litigation, and, therefore, no statutory tolling of the limitations period,
5 since 2007, when the dismissal of Petrocelli's third state habeas action was affirmed on appeal. *See*
6 Exhibit 41. Therefore, a *Kelly* stay would benefit Petrocelli only to the extent that his newly-exhausted
7 claims – those to be added back into the federal petition following the requested stay – would relate back
8 to exhausted claims to be included in the stayed petition.

9 Petrocelli makes general arguments that the newly-exhausted claims would not be time-barred,
10 but he does not provide any specific analysis, in this regard, with respect to any particular claim. The
11 court, however, has examined the unexhausted claims in the fourth amended petition, which Petrocelli
12 would exhaust during a stay (Grounds 7(e), 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b),
13 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and
14 31), and has compared those claims to the exhausted claims in the fourth amended petition, which would
15 be pled in a stayed fifth amended petition, following the *Kelly* procedure (Grounds 6(c), 6(d), 7(b), 7(f),
16 10, 12, and 13). *See King*, 564 F.3d at 1142 (“[W]e hold that *Mayle* requires a comparison of a
17 petitioner's new claims to the properly exhausted claims left pending in federal court, not to any earlier
18 version of the complaint containing claims subsequently dismissed for failure to exhaust.”). It appears
19 to the court that, of all Petrocelli's unexhausted claims, there may be colorable arguments that three of
20 those claims might relate back, under *Mayle*, to exhausted claims in Petrocelli's fourth amended petition.
21 Grounds 15(d) and 17 might arguably relate back to Ground 12, and Ground 19 might arguably relate
22 back to Ground 7(b). The court assumes, for purposes of this analysis only, and without finally deciding
23 the relation-back issue, that Grounds 15(d), 17, and 19 would relate back to exhausted claims, and could
24 therefore survive a statute of limitations challenge following a *Kelly* stay. There appears to be no
25 colorable argument that any of Grounds 7(e), 8(b), 9, 11, 14, 15(a), 15(b), 15(c), 15(e), 16(a), 16(b),
26

1 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 would
2 relate back to exhausted claims in the fourth amended petition.

3 Implementation of the *Kelly* procedure is a matter of this court's discretion. *See King*, 564 F.3d
4 at 1143. The court will exercise its discretion to deny Petrocelli a *Kelly* stay. The killing of James
5 Wilson, underlying this case, occurred on March 29, 1982, and Petrocelli was convicted in September
6 of that year – nearly three decades ago. In the time since his conviction, Petrocelli has litigated, in state
7 court, a direct appeal and three state habeas actions. The last of those state habeas actions was litigated
8 during a stay of this federal habeas case, between August 2003 and July 2007. In exercising its
9 discretion, the court is mindful of the important principles of comity and federalism. The State has a
10 strong interest in the finality of its criminal judgments, and execution of its capital sentences without
11 undue delay. The court is also mindful of the congressional intent behind AEDPA, the most recent
12 wide-ranging federal legislation in the habeas area, to “reduce delays in the execution of state and
13 federal criminal sentences, particularly in capital cases.” *See Rhines*, 544 U.S. at 276. The court is also
14 cognizant, however, that, facing the ultimate punishment, capital habeas petitioners must be provided
15 reasonable opportunity to exhaust potentially meritorious habeas claims in state court, to avoid
16 unnecessary forfeiture of such claims. With these considerations in mind, and well-informed of the
17 procedural history of this case, this court cannot countenance another stay of this action to provide time
18 for yet another – it would be Petrocelli's fourth – state habeas action.⁷ The court will deny Petrocelli's
19 motion for a stay, will require Petrocelli to abandon his unexhausted claims or face dismissal of his
20 entire fourth amended petition, and will move this action toward resolution of Petrocelli's viable claims,
21 on their merits.

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25 ⁷ Respondents have made no showing that Petrocelli has ever engaged in dilatory litigation
26 tactics, or that he has otherwise acted in bad faith in any manner in the state courts or in this court. And,
certainly, the court does not mean to suggest that any improper delay has been the fault of Petrocelli's
current counsel, who became Petrocelli's counsel on September 27, 2007 (docket #140), after the
conclusion of Petrocelli's last state habeas action.

1 **IT IS THEREFORE ORDERED** that petitioner's Motion for Leave to File Reply Brief Over
2 Twenty Pages in Length (docket #216) is **GRANTED**. The reply in support of the motion for stay has
3 already been filed, and has been considered in this order; therefore, no further action on the part of the
4 Clerk is necessary in this regard.

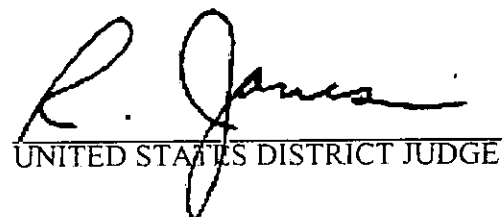
5 **IT IS FURTHER ORDERED** that petitioner's Motion to Stay Proceedings and Hold Litigation
6 in Abeyance (docket #203) is **DENIED**.

7 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** from the date of entry of this
8 order to file a notice of abandonment of unexhausted claims, abandoning the claims in his fourth
9 amended petition that have been held to be unexhausted in state court (Grounds 7(e), 8(b), 9, 11, 14,
10 15(a), 15(b), 15(c), 15(d), 15(e), 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g), 16(h), 16(i), 17, 18, 19,
11 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31). If petitioner does not, within the time allowed, file
12 a notice of abandonment of unexhausted claims, abandoning all of his unexhausted claims, petitioner's
13 Fourth Amended Petition (docket #162) will be dismissed, in its entirety, pursuant to *Rose v. Lundy*, 455
14 U.S. 509 (1982).

15 **IT IS FURTHER ORDERED** that, if petitioner files a notice of abandonment of unexhausted
16 claims, abandoning all of his unexhausted claims, within the time allowed, respondent shall thereafter
17 have **90 days** to file an answer, responding to the exhausted claims remaining in petitioner's fourth
18 amended petition (Grounds 6(c), 6(d), 7(b), 7(f), 10, 12, and 13).

19 **IT IS FURTHER ORDERED** that, in all other respects, the schedule for further proceedings
20 set forth in the order entered November 16, 2007 (docket #147) shall remain in force.

21
22 Dated this 10th day of March, 2011.

23
24 
25 UNITED STATES DISTRICT JUDGE
26